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No. 77-481

In the Supreme Court of the United States

OCTOBER TERM, 1977

GREENE COUNTY PLANNING BOARD, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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The Solicitor General submits this response on behalf of the Federal Energy Regulatory Commission.[1]

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[1]On September 30, 1977, pursuant to the Department of Energy Organization Act (DOE Act), Pub. L. 95-91, 91 Stat. 565, and Executive Order No. 12009, 42 Fed. Reg. 46267, the Federal Power Commission ceased to exist. Most of its functions and regulatory responsibilities were transferred to the Federal Energy Regulatory Commission, which, as an independent commission within the Department of Energy, was activated on October 1, 1977. The "savings provisions" of Section 705 of the DOE Act, 91 Stat. 606, provide for the substitution of the Federal Energy Regulatory Commission for the Federal Power Commission in pending litigation such as this case.

OPINIONS BELOW

The opinion of the court of appeals *en banc* (Pet. App. A) is reported at 559 F. 2d 1237. The opinion of a panel of the court of appeals (Pet. App. C) is reported at 559 F. 2d 1227. The orders of the Federal Power Commission (Pet. Apps. E and F) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1977. The petition was filed on September 27, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission has statutory authority to provide compensation, under appropriate standards and procedures, for expert witness fees, attorneys' fees and other expenses of parties who intervene in its proceedings.

STATUTES INVOLVED

Section 2 of the Federal Power Act, 41 Stat. 1063, as amended, 16 U.S.C. 793, and Section 308 of that Act, as added, 49 Stat. 858, 16 U.S.C. 825g, are set forth in pertinent part at Pet. App. K, pp. 123a-124a. Sections 309 and 314(c) of the Federal Power Act, as added, 49 Stat. 858, 861, 16 U.S.C. 825h and 825m(c), are set forth in an Appendix, *infra*, pp. 1a-2a.

STATEMENT

In August 1968, the Power Authority of the State of New York (PASNY) applied for a license from the Federal Power Commission to construct and operate a pumped storage power project some 40 miles southwest of Albany, New York. The project included construction of

three transmission lines. The Commission granted a license for the project in June 1969, but the license expressly prohibited construction of the transmission lines without further Commission approval of "plans for preservation and enhancement of the environment as it may be affected by the transmission lines design and location." 41 F.P.C. 712, 718. No protests were filed with respect to two of the lines, and the Commission approved their construction without a hearing. However, petitioners and others protested the proposed routing of the third line, which was to run through the Durham Valley in Greene County, an area (situated on the northern edge of the Catskills) of scenic and historic value. In May 1970 petitioners were permitted to intervene in the licensing proceeding. In May 1971 the Commission ordered a hearing on PASNY's application. In June 1971 petitioners moved that PASNY, or the Commission, pay the expenses, including expert witness fees and attorneys' fees, incurred by them in the proceeding. Petitioners also moved that the Commission rescind the June 1969 license for the projects and stop further construction, on the grounds that the Commission was in violation of the Federal Power Act and the National Environmental Policy Act of 1969 (NEPA). In October 1971 the Commission denied petitioners' motions, 46 F.P.C. 1101, and a petition for review followed. *Greene County Planning Board* v. *Federal Power Commission*, 455 F. 2d 412 (C.A. 2) ("*Greene County I*"), certiorari denied, 409 U.S. 849.

In *Greene County I* the court of appeals held that the Commission had violated NEPA by failing to prepare its own environmental impact statement and relying on PASNY's statement instead. On the question of expenses and fees, however, the court declined to order the Commission to reimburse petitioners. The court noted

that while the Commission's order denying such payments appeared to be based on the Commission's view "that it had no authority to grant them," the Commission had argued to the court "that it has foreclosed only the present award of fees and has left open the question of whether ultimately to award them when the proceedings have come to an end." 455 F. 2d at 425. The court concluded, "in agreement with the Commission's position," that "at this posture of the proceedings and under current circumstances, without a clearer congressional mandate we should not order the Commission or PASNY to pay the expenses and fees of petitioners, either as they are incurred or at the close of the proceedings." 455 F. 2d at 426.[2]

Following the court's remand, the Commission prepared an environmental impact statement on the transmission line and conducted a proceeding that included a lengthy hearing in which petitioners participated and presented expert witnesses.[3] In July 1974,

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[2]The court thus apparently held that *it* lacked statutory authority to *order* the Commission to award reimbursement, without reaching the question whether the Commission itself had discretionary authority to provide reimbursement in appropriate circumstances. Thus, the court added that "[w]ithout a showing of compelling need, it would be premature for us to inject the federal courts into this area of administrative discretion, perhaps foreclosing more flexible approaches through agency action or rules." 455 F. 2d at 427. However, in discussing Section 309, 16 U.S.C. 825h, one of the statutes relied on by petitioners, the court observed that "we perceive no basis in the terms of the provision to extend the Commission's power to include paying or awarding the expenses or fees of intervenors." *Id.* at 426.

[3]In the course of the proceeding petitioners again sought review in the court of appeals, challenging the adequacy of the impact statement; the court dismissed this challenge as premature. *Greene County Planning Board* v. *Federal Power Commission*, 490 F. 2d 256 (C.A. 2) ("*Greene County II*"). In addition, petitioner Greene County Planning Board sought review in 1975 of a Commission order granting PASNY a permit under Executive Order No. 10485 (3 C.F.R. 970 (1949-1953 Comp.)) and Section 7(d) of the Energy Supply and Environmental Coordination Act of 1974, 88 Stat. 260, 15 U.S.C. (Supp. V) 793(d), to construct a transmission facility on the Canadian border. The court dismissed this petition on the ground that it lacked jurisdiction to review such orders. *Greene County Planning Board* v. *Federal Power Commission*, 528 F. 2d 38 (C.A. 2) ("*Greene County III*").

the Commission's administrative law judge issued an opinion authorizing construction of the line but selecting a different route from that proposed by PASNY and the Commission's staff, a route that skirted the Durham Valley. In January 1976, the Commission affirmed this decision. With respect to petitioners' renewed motion for reimbursement of their fees and expenses, the Commission reaffirmed its earlier denial. It stated (Pet. App. E, pp. 39a-41a):

> The Court in *Greene County I* could see no Congressional mandate for requiring the payment of fees and expenses in Section 309 or 314(c) of the Federal Power Act or in Section 102(1) of NEPA cited by Greene County, but would not make a final determination of that point in view of the procedural disposition. * * *
>
> Upon considering this matter further we do not find that Intervenors here have made a case for an award of expenses and fees even if we had the authority to make such an award. The Intervenors represent local towns and land owners who could conceivably have been damaged by the Gilboa-Leeds line. They had every right to present their cases as have countless other intervenors in cases before the

> Commission, who intervene for the benefit of local areas either because they do not desire the building of a hydroelectric project or pipeline or because they want it and the energy supplies made available. These intervenors are protecting their own interests, and we see no reason to grant them fees and expenses. If they were generally allowed, a large financial burden would be imposed on this Commission and the taxpayer or upon the utility involved and inevitably on its ratepayers. In the absence of a mandate in the statute we are loath to attempt such an expensive departure from past practice.

In April 1976 the Commission denied petitions for rehearing, stating with respect to the reimbursement issue (Pet. App. F, p. 43a): "This matter is covered in [the decision just quoted] and further comment is not necessary."

On petition for review, a panel of the court of appeals affirmed the Commission's grant of PASNY's license for the transmission line but remanded the order with respect to the denial of reimbursement (Pet. App. C, pp. 19a-34a). The panel read the Commission's order as "holding that it lacked the authority to make such payments and that none of the intervenors deserved such compensation in any event since they had only been 'protecting their own interests' " (Pet. App. C, p. 27a). The panel then noted (*id.* at 27a-28a) that after the Commission's decision, the Comptroller General had issued opinions to the effect that the Nuclear Regulatory Commission and nine other federal agencies, including the Federal Power Commission, did have implied authority under their statutes to pay expenses and fees of intervening parties in certain circumstances (see Pet. Apps. G, H, I, J, pp. 44a-122a). Since "the Comptroller General is Congress's agent

for the purpose of determining the legality of administrative expenditures, *see* 31 U.S.C. §65(d)," and since his opinion here was "not clearly incorrect," the panel concluded that "the FPC now appears to have authorization to pay intervenors' expenses" (Pet. App. C, pp. 28a-29a). The panel accordingly remanded the case to the Commission for reconsideration of its holding and a determination whether compensation of petitioners was appropriate (Pet. App. C, p. 30a).

Judge Van Graafeiland dissented. He challenged the weight given by the majority to the Comptroller General's view of the Commission's authority "in the face of the Commission's own determination that it has no such power and this Court's finding in support thereof" (Pet. App. C, p. 31a). He further stated that "[w]e * * * needlessly inject the Federal Courts into an area of administrative discretion when we compel the Federal Power Commission to conform its practices to what the Comptroller General opines are proper" (*id.* at 33a), and he concluded that "[w]e should not require the Commission to reconsider its discretionary determination merely because we have some doubts about its fairness" (*id.* at 34a).

The Commission petitioned for rehearing. It argued, among other things, that its interpretation of its own statutory authority was "entitled to great deference by the courts," and that "[t]he reviewing court should not substitute its judgment for that of the Commission, if the Commission's interpretation is reasonable" (FPC Br. on Rehearing *En Banc*, p. 15). The Commission said that the panel should not have rejected "the Commission's interpretation of its statutory authority" simply because the Comptroller General's opinion was " 'not clearly incorrect' " (*ibid.*).

The court of appeals *en banc*, in a five-to-three decision, reversed the panel and upheld the Commission's order (*"Greene County IV"*). The majority, in an opinion by Judge Van Graafeiland, held that "the Federal Power Commission has no statutory authority to make the disbursements in question" (Pet. App. A, p. 5a). It noted that the Commission "has never deemed itself authorized" to make such payments, and that "[t]his interpretation of the Federal Power Act by the agency charged with its administration is entitled to great deference from this Court" (*id.* at 4a-5a, n. 2). The court concluded that "[i]n light of the Supreme Court's very broad language in *Alyeska Pipeline Service Co.* v. *Wilderness Society* [,421 U.S. 240, 257,] that 'absent statute or enforceable contract, litigants pay their own attorneys' fees,' a finding that the Federal Power Commission is empowered to reimburse intervenors for their legal expenses must await appropriate Congressional action" (Pet. App. A, p. 6a).

DISCUSSION

The court below appears to have held that the Federal Power Commission, and hence its successor the Federal Energy Regulatory Commission, lacks statutory authority under any circumstances to expend its funds to defray the expert witness fees, attorneys' fees or other expenses of intervenors in its proceedings. This holding accords with the view that was taken and urged on the court of appeals by the Federal Power Commission. The Federal Energy Regulatory Commission, however, has concluded that the holding is erroneous. This Commission believes that it does have authority under the Federal Power Act, and the Department of Energy Organzation Act,[4] to

[4]The Department of Energy Organization Act (DOE Act), Pub. L. 95-91, 91 Stat. 565, abolished the Federal Power Commission and, as of October 1, 1977, created the Federal Energy Regulatory Commission (see note 1, *supra*). The Act transfers to the Federal Energy Regulatory Commission most of the functions and powers that were exercised by the Federal Power Commission under both the Federal Power Act, 16 U.S.C. 791a *et seq.*, and the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717 *et seq*. The Act provides that "[t]he Commission may exercise any power under [certain enumerated sections of the Federal Power Act and the Natural Gas Act] to the extent the Commission determines such power to be necessary to the exercise of any function within the jurisdiction of the Commission" (Section 402(a)(2), 91 Stat. 584).

compensate intervenors in its proceedings for their expenses, including attorneys' fees, in appropriate circumstances. This Commission has also concluded, contrary to the view that was apparently taken by the Federal Power Commission (Pet. App. E, p. 41a), that the fact that petitioners were "protecting their own interests" would not compel the conclusion that they should be denied such compensation. Under what circumstances compensation by the Commission would be appropriate, what procedures should be adopted, and whether and how much these petitioners should be compensated, are all questions that the Commission has not decided. The Commission wishes to consider and decide these questions, and will do so if allowed to.[5]

The decision of the court of appeals concerning the authority of the Federal Power Commission was based, at least in part, on the position taken by that Commission

[5]Many other agencies and departments of the federal government have concluded, in accord with the opinions of the Comptroller General, that their authorizing statutes permit them, under appropriate standards and procedures, to defray attorneys' fees and other expenses of intervenors in their proceedings. Having found that intervenors frequently make significant contributions to the development of relevant information and the resolution of public policy issues, many agencies and departments have established standards and procedures for providing such compensation, and others are preparing to do so.

concerning its own authority. While the different view now taken by the Federal Energy Regulatory Commission cannot conclude the legal issue, it should be entitled to as much weight as the view of the former Commission. There is no reason to doubt that the court of appeals would give it appropriate weight, and there is reason to believe that it might affect the court's decision. We therefore suggest that the most appropriate disposition of this case at this juncture would be for the Court to grant the petition for certiorari, vacate the judgment of the court of appeals, and remand the case to that court for reconsideration in the light of the changed circumstances.

1. Broad as the holding of the court of appeals appears to be, it is important to note several issues that are not presented here.

First, neither the petition nor the decision below presents the question whether the Commission is *required* to reimburse petitioners or any other intervenors for any expenses.[6] In *Greene County I* the court held that it had no authority to require the Commission to reimburse petitioners, and we do not understand petitioners to question the correctness of that holding. Cf. *Fitzgerald* v. *United States Civil Service Commission*, 554 F. 2d 1186 (C.A. D.C.), where the court rejected the plaintiff's claim that he was entitled to attorneys' fees as part of his damages for having been wrongfully discharged.

[6]As the Comptroller General said in responding to the inquiry of the Nuclear Regulatory Commission presenting the same issue that is involved here, "[t]here is also no question of *compelling* NRC to pay the expenses of any of the parties" (Pet. App. G, pp. 64a-65a; emphasis in original).

Second, the petition raises no question concerning the scope of the Commission's discretion in granting or denying compensation for attorneys' fees or other expenses, the proper circumstances or conditions for such compensation, whether these petitioners should be awarded any compensation, or, if so, how much they should be awarded. Those are questions for the Commission to decide in the first instance, if it is allowed to do so.[7]

Third, the issue here involves only the Commission's authority to defray expenses and attorneys' fees with respect to participation in proceedings before the Commission. It involves no question concerning the Commission's authority or obligation to defray expenses or fees with respect to collateral proceedings, such as petitions for judicial review.[8] We contend only that the Commission has statutory authority to provide financial aid for the purpose of assisting its own decision-making functions, not the decision-making functions of other bodies.

2. We submit that, as the Comptroller General has concluded, the statutory powers of the Federal Power Commission, and now the Federal Energy Regulatory Commission, are broad enough to permit the Commission to disburse funds to intervenors for the payment of attorneys' fees and other expenses when the Commission

[7]In contending that the Commission has statutory authority to provide compensation for attorneys' fees and other expenses, we express no view on any of these questions.

[8]As the history of this case reflects, petitioners have expended substantial time and effort in judicial proceedings in which the Federal Power Commission was a party. See note 3, *supra*.

decides, under appropriate standards and procedures, that such disbursement would assist it in carrying out its statutory functions.

The Federal Power Act, 16 U.S.C. 791a *et seq.*, imposes a wide range of regulatory responsibilities on the Commission, including the issuance of licenses to construct and operate electric transmission lines such as the one involved in this case (Section 4(e), 16 U.S.C. 797(e)).[9] Under the Power Act and the DOE Act, the Commission is given broad powers to carry out these responsibilities. The DOE Act, while it places the Commission within the Department of Energy for budgetary purposes, declares generally (Section 401(c), 91 Stat. 582) that "[t]he Secretary shall provide to the Commission such support and facilities as the Commission determines it needs to carry out it functions." Section 309 of the Power Act, 16 U.S.C. 825h, empowers the Commission "to perform any and all acts * * * as it may find necessary or appropriate to carry out the provisions of this chapter." Section 308(a) of the Power Act, 16 U.S.C. 825g(a), authorizes the Commission to hold hearings and, "in accordance with such rules and regulations as it may prescribe, * * * [to] admit as a party * * * any representative of interested consumers * * * or any other person whose participation in the proceeding may be in the public interest." And Section 314(c) of the Act, 16 U.S.C. 825m(c), provides:

> The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it * * *.[10]

The courts have frequently recognized that the Commission's powers must be broadly construed, and that they include not only powers explicitly conferred but also such implied powers as are necessary and proper for the discharge of the Commission's statutory functions. See, *e.g.*, *Mesa Petroleum Co.* v. *Federal Power Commission*, 441 F. 2d 182, 187 (C.A. 5); *Niagara Mohawk Power Corp.* v. *Federal Power Commission*, 379 F. 2d 153, 158 (C.A. D.C.); *Public Service Commission of State of New York* v. *Federal Power Commission*, 327 F. 2d 893, 896-897 (C.A. D.C.); *Metropolitan Edison Co.* v. *Federal Power Commission*, 169 F. 2d 719, 723 (C.A. 3). As this Court said in the *Permian Basin Area Rate Cases*, 390 U.S. 747, 776, "[s]urely the Commission's broad responsibilities * * * demand a generous construction of its statutory authority."

There is no reason to depart from these principles when considering the Commission's authority to defray attorneys' fees and other expenses of intervenors in its proceedings.[11] The power to provide such compensation to persons who contribute to the effective performance of the Commission's functions is no different in kind from the power to employ technical or legal consultants for

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[9]This section of the Federal Power Act, along with all the others cited in this paragraph of the text, is among the sections expressly carried over to the Federal Energy Regulatory Commission by Section 402(a)(2) of the DOE Act, 91 Stat. 584, quoted in note 4, *supra*.

[10]The same provision appears in the Commission's other major authorizing statute, the Natural Gas Act, 15 U.S.C. 717s(c).

[11]*Royal Indemnity Co.* v. *United States*, 313 U.S. 289, cited by the court below (Pet. App. A, p. 6a), is not to the contrary. Indeed *Royal Indemnity* expressly stated that federal officers are without power to disburse public funds "save only as [the power] has been conferred upon them by Act of Congress *or is to be implied from other powers so granted*" (emphasis supplied). 313 U.S. at 294.

particular projects or proceedings.[12] The court below erred in concluding that, in the absence of a statutory provision expressly authorizing expenditures for this purpose,[13] the Commission had no such power under any circumstances.

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[12]Indeed, with respect to compensation for the services of attorneys, Section 314(c) of the Federal Power Act (16 U.S.C. 825m(c)), quoted at page 13, *supra*, might be viewed to constitute an express statutory authorization. Especially pertinent is its empowerment of the Commission to employ attorneys "for proper representation of the public interests in * * * cases or proceedings pending before it * * *." This section was not discussed in the decision below. The court in *Greene County I* did refer to the section—but quoted only the authorization to employ attorneys "for proper legal aid and service of the Commission * * *," not the provision we have just quoted—and expressed the apparent view that the section refers only to the engagement of attorneys in an employer-employee relationship. 455 F. 2d at 426-427. The language does not compel such a narrow reading, and the principles applicable to construction of agency authorizations (see the cases cited at page 13, *supra*) would seem to reject it.

[13]One agency, the Federal Trade Commission, now has express authority to "provide compensation for reasonable attorneys fees, expert witness fees and other costs of participating in a rulemaking" to persons representing an interest that would not otherwise be adequately represented in the proceeding. 15 U.S.C. (Supp. V) 57a(h)(1), discussed in the opinion of the Comptroller General dated February 19, 1976 (Pet. App. G, pp. 54a-57a). The Comptroller General noted that that statute was intended to formalize the prior practice of the Trade Commission based on an earlier opinion of the Comptroller General, and was not intended to indicate a lack of authority on the part of agencies without such express authorization (Pet. App. G, pp. 56a-57a). See, *e.g.*, H.R. Conf. Rep. No. 93-1445, 93d Cong., 2d Sess. 37 (1974), which recommended against an amendment to the Energy Reorganization Act of 1974, 88 Stat. 1233, that would have provided the Nuclear Regulatory Commission with the same express authority, on the ground that "it appears that there is nothing in the Atomic Energy Act, as amended, which would preclude the Commission from reimbursing parties where it deems it necessary."

3. The court below and the Federal Power Commission erred in concluding that the issue in this case is governed by *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, or *Turner* v. *Federal Communications Commission*, 514 F. 2d 1354 (C.A. D.C.). The issue in those cases was fee shifting—that is, the asserted authority of a court or agency to compel a losing litigant to pay the attorneys' fees of the prevailing party. The decisions there were based on the long-established rule in this country against fee-shifting in the absence of a clear statutory mandate, and on the policy considerations underlying that rule. As the opinions of the Comptroller General recognize (see Pet. App. G, pp. 63a-65a), the issue in this case is different. The issue here is whether an agency has the statutory authority to disburse its own funds for the compensation of attorneys whose representation of parties before the agency advances the effective performance of the agency's functions, where in the absence of compensation the agency may not receive such assistance. This issue is controlled by the agency's authorizing statutes, and in the case of the Federal Energy Regulatory Commission we submit that the authority exists.

Intervenor PASNY argues in opposition to the petition (PASNY Br. in Opp., pp. 14-16) that reimbursement to intervenors would involve an element of fee shifting because Section 10(e) of the Federal Power Act, 16 U.S.C. 803(e), provides that licensees under Part I of the Act "shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs

of administration of this Part * * *."[14] This argument, which was not discussed in the decision below, is incorrect.

First, Section 10(e) does not by its terms require licensees to bear the entire costs of administration, and annual charges in fact do not cover the full costs of administration. Moreover, Section 10(e) provides that the amounts of annual charges are "to be fixed by the Commission." Section 10(e) would not, in our view, require the Commission to include amounts disbursed to intervenors in the costs recouped through the annual charges.

Second, even if such disbursements were included as costs of administration under Section 10(e) and thus borne by all the Commission's licensees, this result would not constitute fee-shifting as commonly understood. It would lack, for one thing, the element of imposing the winning party's fees substantially, directly, and exclusively on the losing party in the same case, which characterizes the judicial fee shifting that was rejected in *Alyeska* and which figures prominently in the policy arguments favoring such rejection.

In any event, since the Commission has not determined how much compensation, if any, would be appropriate, and since aggregate disbursements when apportioned among all licensees might be *de minimis*, any contention

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[14]The Federal Power Commission made the same argument in its brief on rehearing in the court below (FPC Br. on Rehearing *En Banc*, pp. 9-11). The fixing of annual charges to be paid by licensees under Section 10(e) of the Federal Power Act is a function of the Federal Power Commission that has been carried over to the Federal Energy Regulatory Commission by virtue of Section 402(a)(1)(A) of the DOE Act, 91 Stat. 584).

that such disbursements would have the effect of fee shifting, in violation of the principles set forth in *Alyeska*, is premature.

4. We therefore believe that the court below erred in holding that the Commission lacks statutory authority to defray the expenses of intervenors in any circumstances. We suggest, however, that the appropriate disposition of this case at this juncture would be to grant the petition for certiorari, vacate the judgment of the court of appeals, and remand the case to that court for reconsideration of the issue in the light of the position taken by the Federal Energy Regulatory Commission. We suggest this disposition because there appears to be a reasonable possibility that the court of appeals would view the matter differently in the light of the view held by the new Commission, as opposed to that formerly held by the Federal Power Commission, and because we believe the court of appeals should be given the opportunity to consider the effect of the changed legal posture in which the case now stands.

The court of appeals was evidently influenced by the position of the Federal Power Commission. The majority opinion of the *en banc* court appeared to rely on the fact that the Federal Power Commission had "never deemed itself authorized" to award compensation for attorneys' fees, and on the principle that "[t]his interpretation of the Federal Power Act by the agency charged with its administration is entitled to great deference from this Court" (Pet. App. A, pp. 4a-5a, n. 2). Moreover, Judge Van Graafeiland, the author of the majority opinion, had dissented from the panel opinion on the ground, among others, that "[w]e * * * needlessly inject the Federal courts into an area of administrative discretion when we compel the Federal Power Commission to conform its practices to what the Comptroller General opines are proper" (Pet. App. C, p. 33a).

The same considerations of agency discretion may now lead a majority of the court of appeals to a different conclusion. The court may now conclude that since the Federal Energy Regulatory Commission—the agency now charged with the responsibility of interpreting and implementing the Federal Power Act and other statutes—believes it does have the authority to provide compensation for intervenors' expenses in appropriate circumstances and desires to exercise that authority,[15] the courts should defer to this view if it is not an unreasonable interpretation of the statutes in question.[16] We believe the court below should be given an opportunity to consider the issue in this new light, and, if it does reach a different conclusion, to remand the case to the Commission for a determination of what procedures

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[15]Although the Federal Power Commission appeared to deny petitioners' application for reimbursement partially on the ground that it would not have exercised its discretion to provide reimbursement even if it had that discretion, it is not clear that this constituted an alternative holding unaffected by the Commission's view of its lack of authority. See Pet. App. E, pp. 38a-41a. In any event, the Federal Energy Regulatory Commission does not share the Federal Power Commission's apparent view that discretionary reimbursement should be withheld whenever intervenors were "protecting their own interests" (*id.* at 41a), a view that would disqualify virtually all intervenors.

[16]It is well settled that "an agency's view of what is in the public interest may change, either with or without a change in circumstances" (*Greater Boston Television Corp.* v. *Federal Communications Commission*, 444 F. 2d 841, 852 (C.A. D.C.), certiorari denied, 403 U.S. 923). See *Automobile Club of Michigan* v. *Commissioner of Internal Revenue*, 353 U.S. 180, 183; *Chisholm* v. *Federal Communications Commission*, 538 F. 2d 349, 364 (C.A. D.C.), certiorari denied, 429 U.S. 890. This principle should apply with special force to a new agency assuming statutory responsibilities from a predecessor agency, particularly when the issue involves the new agency's view of how best to shape its own procedures in order to discharge most effectively its statutory functions.

and standards should be adopted and of what compensation, if any, should be awarded to these petitioners. If the court below adheres to its prior conclusion despite the new view taken by the new Commission, this Court will then be in a better position to consider whether the case warrants plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court below vacated, and the case remanded to the court of appeals for reconsideration in the light of the position taken by the Federal Energy Regulatory Commission.

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Federal Energy Regulatory Commission.

JANUARY 1978.

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APPENDIX

Section 309 of the Federal Power Act, as added, 49 Stat. 858, 16 U.S.C. 825h, provides:

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

Section 314(c) of the Federal Power Act, as added, 4 Stat. 861, 16 U.S.C. 825m(c), provides:

> The Commission may employ such attorneys as finds necessary for proper legal aid and service of the Commission or its members in the conduct of the

> work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.